78-1933

In the

Supreme Court of the United States

1978 Term

No. [redacted]

STEVEN H. MONTGOMERY, Individually, and d/b/a
LAMINATING COMPANY OF COLORADO,
and d/b/a
AMERICAN LAMINATING COMPANY,
PETITIONER,

v.

CENTURY LAMINATING, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John R. Frye, Jr.

FRYE AND SAWAYA
Attorney for the Petitioner
50 South Steele Street, Suite 360
Denver, Colorado 80209
(303) 388-0904

INDEX

LIST OF AUTHORITIES CITED

In the

Supreme Court of the United States

1978 Term

No.....

STEVEN H. MONTGOMERY, Individually, and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, PETITIONER,

v.

CENTURY LAMINATING, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 2, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 595 F.2d 563 and is printed in Appendix A hereto, infra page A-1. The judgment of the United States District Court for the District of New Mexico is printed in Appendix B hereto, infra page B-1.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on April 2, 1979 (Appendix A, infra page___). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

A jury verdict was returned against the Defendant-Appellant, the Petitioner herein. Subsequently, the Petitioner filed a Motion for Judgment *non obstante veredicto* and the Respondent filed a Motion Seeking Injunctive Relief. Thereafter, but prior to the trial court's ruling on the then pending motions, the Petitioner filed a Notice of Appeal. The trial court denied the Petitioner's Motion for Judgment *non obstante veredicto* and granted the Respondent's Motion for an Injunction. On appeal, the Court of Appeals for the Tenth Circuit concluded that the Notice of Appeal was premature and, therefore the Court of Appeals was without jurisdiction to hear the merits of the case. The appeal was dismissed for want of jurisdiction. The question presented is:

Where a Notice of Appeal is filed prior to the entry of a final judgment, may an appellate court accept the notice as if it were filed for review of the final judgment and exercise jurisdiction pursuant to 28 U.S.C. §1291, or does the premature filing deprive the appellate court of jurisdiction?

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. §1291 are set forth in the Appendix at pages C-1 and D-1 respectively.

STATEMENT OF CASE

This action was originally filed in the New Mexico state courts and removed to the United States District Court

for the District of New Mexico. The Plaintiff, CENTURY LAMINATING, LTD., sought damages and injunctive relief for the breach of a contract. The Defendant, STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY asserted a counterclaim alleging violation of Federal anti-trust laws and breach of contract.

On May 9, 1977, following a trial to a jury, the Honorable J. Vearle Payne, presiding, the jury returned a verdict awarding monetary damages to the Plaintiff. On May 11, 1977, judgment was entered thereupon. Thereafter on May 19, 1977, the Defendant filed a Motion for Judgment *non obstante veredicto*. On the same date, the Plaintiff filed a Motion Seeking Injunctive Relief. On June 10, 1977, the Defendant filed a Notice of Appeal, while the Defendant's Motion for Judgment *non obstante veredicto* and the Plaintiff's Motion for Injunctive Relief were still pending. The Court denied the Motion for judgment *non obstante veredicto* on June 19, 1977, and it granted the Motion for Injunctive Relief on August 9, 1977. On September 7, 1977, the Defendant filed a Motion for Stay of the Injunction pending appeal, which motion was denied on November 9, 1977. The Defendant did not file an additional Notice of Appeal following the original notice filed on June 10, 1977.

On appeal, the Defendant, Petitioner herein, urged a number of grounds for reversal of the trial court judgment. These issues, which are not pertinent herein, were thoroughly briefed by both parties. The Plaintiff filed a motion to dismiss the appeal as being untimely. The motion was denied by the Court of Appeals "with leave to renew the motion at the time of oral argument." The motion was was renewed by the Plaintiff at oral argument, and it is on the basis of that motion that the Court of Appeals

concluded that it was without jurisdiction to hear the appeal on the merits.

In essence, the Court of Appeals determined that the finality requirement of 28 U.S.C. §1291 is absolute, and that the filing of a Notice of Appeal prior to the entry of a final judgment is a nullity. The Court of Appeals began its analysis with the premise that the Court has only such jurisdiction as is conferred by statute and that the Court's jurisdiction is limited to appeals from final decisions. 28 U.S.C. §1291; *United States v. Nixon,* 418 U.S. 683, 690 (1974). The Court continued by defining a final decision as being ". . . one which ends the litigation on the merits and leaves nothing for the Court to do but execute judgment."*Century Laminating, Ltd. v. Montgomery,* 595 F.2d 563, 565 (1979). The Court distinguished the present case from its decision in *Morris v. Uhl & Lopez Engineers, Inc.,* 442 F.2d 1247 (10th Cir. 1971), based on a finding in *Morris* that the various claims and judgments therein were separable pursuant to Rule 54 (b), Fed. R. Civ. P.

The Court then went on to state that where a trial court retains power to review its judgment (in this case the Motion for Judgment *non obstante veredicto* provided the Court with such power) the judgment is not final. Since the judgment was not final, the Defendant's premature Notice of Appeal was an attempt to appeal a non-final order and was, thus, a nullity. The Court concluded that the premature Notice of Appeal did not transfer jurisdiction to the Court of Appeals.

The Court stated that the Defendant did not loose his right to appeal. Rather, the Defendant could have perfected his appeal by filing a Notice of Appeal within thirty (30) days of the entry of the Court's denial of the Motion for Judgment *non obstante veredicto.*

The Court of Appeals choose not "to erode the finality doctrine by indirection." Citing cases from other circuits holding to the contrary, the Court concluded that "Litigants — appellees as well as appellants — have a right to rely upon conformity by their adversaries with applicable statutes and rules especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself." *Century Laminating, Ltd., supra,* at 568.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it creates a conflict between circuit Courts of Appeal regarding the procedural propriety and effectiveness of the filing of a Notice of Appeal prior to the entray of a final, appealable judgment by a trial court.

At the outset, the Petitioner must note that he does not contest the fact that the judgment entered on the jury verdict on May 11, 1977 was not a final judgment as the Petitioner had filed his Motion for Judgment *non obstante veredicto.* However, it is the Petitioner's position that the filing of the Notice of Appeal prior to the Court's ruling on Petitioner's Motion for Judgment *non obstante veredicto* did not create a fatal impediment to the Court's jurisdiction to review the case on its merits. Although the Notice of Appeal was filed prematurely, it properly advised the Plaintiff that an appeal was being taken. Since the trial court denied the Motion for Judgment *non obstante veredicto,* and did not alter the issues on appeal, the Court of Appeals should have accepted jurisdiction. Had it taken such action, the Court of Appeals would not have prejudiced the rights of the Plantiff.

One must start from the premise, as did the Court of Appeals, that the Courts of Appeal have jurisdiction to review the final orders of district courts. 28 U.S.C. §1291.

"The basic policy considerations underlying the limitation that a final judgment is a prerequisite to appealability are the excess inconvenience and costs occasioned by piecemeal review on the one hand, and the danger of denying justice by needless delay on the other. *Gillespie v. United States Steel Corp.* 1964 379 U.S. 148, 152-153, 85 S.CT. 308, 311, 13 L.Ed. 2d 199, 203; *In re Forstner Chain Corp.,* 1st Cir. 1949, 177 F. 2d 572, 575." *Markham v. Holt,* 369 F. 2d 940, 942 (5th Cir. 1966). Additionally this Court has stated that the finality rule is intended to prevent appellate court intervention into trial court proceedings. *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541.

In the decision before this Court the Court of Appeals approached the resolution of the question by considering the premature filing of a Notice of Appeal as an attempt to oust the trial court of jurisdiction to complete its proceedings. Seemingly in an attempt to protect trial courts from such an ouster, the Court of Appeals ruled that in almost all circumstances a premature Notice of Appeal is of no effect. The Court concluded that an execption existed in *Morris, supra.* In *Morris,* the trial court failed to certify the primary claim as being separable pursuant to Fed. R. Civ. R., Rule 54(b). It is interesting to note that the Tenth Circuit remanded the case to correct the mere "lack of technical formal finality." *Morris, supra,* at 1250. [Emphasis supplied].

The Petitioner has no quarrel with the proposition that a Notice of Appeal should not be utilized for the purpose of preventing a trial court from proceeding, or from reviewing its own proceedings, in order to correct error at the trial level. In fact, the Tenth Circuit itself ruled that such an attempted ouster is of no effect. ***Arthur Anderson and Co. v. Finesilver,*** **546 F. 2d 338, (10th Cir. 1976), cert denied, 429 U.S. 1096.**

In a well reasoned opinion, Circuit Judge Thornberry stated, speaking for the Court of Appeals for the Fifth Circuit, "this Court has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon." *Markham v. Holt,* 369 F. 2d 940 (1966). Furthermore Circuit Judge Van Dusen stated in *Hodge v. Hodge,* 507 F. 2d 87, 89 (3rd Cir. 1975), "So long as the order is an appealable one, and the non-appealing party is not prejudiced by the prematurity, however, the Court of Appeals should proceed to decide the case on the merits rather than dismiss on the basis of such a technicality." Recently the Court of Appeals for the Second Circuit stated:

> Although the filing of the Notice of Appeal within the prescribed time limits is a jurisdictional prerequisite to the appeal itself, the better rule is that in the absence of prejudice to the appellee, the Court should treat a premature appeal as from a final judgment so as to avoid denial of justice, expense, and inconvenience. This rule applies to appeals that are premature not only because they were filed between the pronouncement of judgment and the entry of judgment [citation omitted], but also because they were filed while a Rule 59 was pending. [Citations omitted].

Yaretsky v. Blum, 592 F. 2d 65 (2nd Cir. 1979); Accord, *Eason v. Dickson,* 390 F. 2d 585 (9th Cir. 1968), cert. denied, 392 U.S. 914; *Richerson v. Jones,* 551 F. 2d 918 (3rd Cir. 1977). The Petitioner strongly urges that such a rule is no less applicable under the present circumstances, where a Notice of Appeal was filed while a Motion for Judgment *non obstante veredicto* was pending.

The matters raised in this petition present a clear cut conflict in the circuits. Although the matter to be decided by this Court may not be considered to be of national im-

portance, it is the type of housekeeping decision that must be made from time to time to prevent disorder in, and eventual chaos, within the Federal Court System. The Petitioner has indicated that the Second, Third, Fifth, and Ninth Circuits consider the premature filing of a notice of appeal to be proper to confer jurisdiction upon the Appellate Court and only the Tenth Circuit has found that a premature filing of a notice of appeal deprives the Court of Appeals of jurisdiction. The Eighth Circuit Court of Appeal, in *Keith vs. Newcourt, Inc.*, 530 F.2d 826, (1976) reached the decision that a notice of appeal filed during the pendency of a new trial *which was subsequently granted* was not final and the appeal must be dismissed, [Emphasis supplied]. It is clear then that many Courts of Appeal, the Tenth Circuit to the contrary notwithstanding, have addressed the issue of whether the premature filing of a notice of appeal was prejudicial to the opposing party. This Court needs to rule upon this particular issue so that timely filing of a notice to appeal does not become a technical nightmare but a matter of notifying the other party that an appeal is to be forthcoming. To allow the premature filing of a notice of appeal to deprive a litigant of his rights to appellate review would serve no purpose especially in light of the fact that an opposing party has not been thereby prejudiced. If all parties are on notice that an appeal will be forthcoming, the Court of Appeal can consider the premature filing of a notice of appeal as merely the indication of intent awaiting the final order of the trial court. There must come a time when technicalities must fall in favor of justice and fair play especially when the act is premature rather than tardy. Surely the filing of the premature Notice of Appeal indicates diligence and respect for the rules of procedure rather than disregard.

The Petitioner can determine no policy that would justify the dismissal of an appeal where a good faith attempt

has been made to properly perfect such a proceeding. The fact that a Notice of Appeal has been filed prematurely will not oust a trial court from finalizing its proceedings. Once trial court proceedings are final, the premature Notice of Appeal can be taken as directed to the appealable final order. Accord, *Eason v. Dickson,* 390 F. 2d 585 (9th Cir. 1968). The requirement of filing a second notice of appeal, under such circumstances, where the appellee has not been prejudiced by the first notice, whould serve no purpose other than to provide in duplicate that which has previously been provided. By its action herein, the Court of Appeals for the Tenth Circuit has taken a position contrary to a number of Circuit Courts of Appeal. The issue presented is one that has been addressed on a number of occasions, and in all likelihood, will require such attention in the future. It is thus a matter deserving of resolution by this Honorable Court.

CONCLUSION

For the reasons set forth above, it is respectively submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

John R. Frye, Jr.
FRYE AND SAWAYA
Attorney for the Petitioner
50 South Steele Street, Suite 360
Denver, Colorado 80209
(303) 388-0904

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CENTURY LAMINATING, LTD.,
Plaintiff-Appellee,

v.

STEVEN H. MONTGOMERY, individually and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY,
Defendant-Appellant.

No. 77-1541

Appeal from the United States District Court for the District of New Mexico (DC. 76-197-P)

Gregory G. Vernon, Richard B. Sartore, Wesley W. Hoyt and William J. Graveley of Vernon, Sartore & Hoyt, Denver, Colorado, submitted on briefs for Defendant-Appellant.

William J. Lock of Robinson, Stevens & Wainwright, Albuquerque, New Mexico, for Plaintiff-Appellee.

Before SETH and BREITENSTEIN, Circuit Judges, and STANLEY, Senior District Judge*.

*Of the District of Kansas, sitting by designation.

STANLEY, Senior District Judge.

On May 11, 1977, judgment was entered on a verdict in favor of the plaintiff-appellee (Century). On May 19, the defendant-appellant (Montgomery) filed a motion for judgment notwithstanding the verdict. Century, on the same date, filed a motion to enjoin the violation by Montgomery of the agreement which was the fountainhead of the litigation. On June 10, Montgomery filed a notice of appeal, " . . . from the final judgment entered on the 11th day of May, 1977." On June 10, when the notice of appeal was filed, Montgomery's motion for judgment n.o.v. and Century's motion for an injunction were pending in the district court. Montgomery's motion for judgment n.o.v. was denied June 19, 1977 and Century's motion for an injunction was granted August 9. On September 7, Montgomery filed a motion for stay of the injunction pending appeal, which was denied November 9. No appeal was taken from any of the orders of the district court made after the entry of judgment on May 11.

Century's motion to dismiss the appeal as untimely was denied by us " . . . with leave to renew the motion at the time of oral argument, the jurisdictional question to be considered with the other issues raised on appeal." The motion was renewed at the time of oral argument and the jurisdictional question must be answered before we may proceed to consideration of the other issues, for, as Judge Murrah once said, " . . . if the appeal is untimely, jurisdiction is lacking and that ends the matter." *Director of Revenue, State of Colorado v. United States,* 392 F.2d 307 (10th Cir. 1968).

United States Courts of Appeal have only such jurisdiction as Congress specifically has given them and the grant of appellate jurisdiction, with exceptions not here pertinent, is limited to appeals from final decisions of those courts. 28 U.S.C. § 1291; *United States v. Nixon,* 418 U.S. 683, 690 (1974).

A final decision is defined as ". . . one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229;*Kappelman v. Delta Airlines, Inc.,* 539 F.2d 165 (D.C. Cir. 1976), *cert denied,* 429 U.S. 1061; *Dunlop v. Ledet's Foodliner of Larose, Inc.,* 509 F.2d 1387 (5th Cir. 1975); *Donovan v. Hayden, Stone Inc.,* 434 F.2d 619 (6th Cir. 1970). The rule requiring finality of a judgment or order as a prerequisite to appeal is dependent upon statute. 28 U.S.C. §1291. Any exceptions must be made by Congress, not by the courts, although to the courts falls the responsibility of deciding whether a judgment or order is final and therefore appealable. It is our duty to resolve that question. *United States v. Grand Jury,* 425 F.2d 327 (5th Cir. 1970); *Levin v. Baum,* 513 F.2d 92 (7th Cir. 1975).

This is not such a case as *Morris v. Uhl & Lopez Engineers, Inc.,* 442 F.2d 1247 (10th Cir. 1971). That case involved multiple claims and multiple parties. Morris, while an employee of one Gottlieb, was injured by the fall of a utility pole which, as a result of decay, broke off at its base. The pole was federally owned and was located on land owned by the United States. It had been inspected and tested by Uhl & Lopez. Morris sued the United States under the Federal Tort Claims Act and Uhl & Lopez for negligence. The United States settled with Morris, cross-claimed against Uhl & Lopez for indemnity and impleaded Gottlieb as a third-party defendant. Morris' claim against Uhl & Lopez was separately tried and the trial court found Morris guilty of contributory negligence and dismissed his claim. Morris filed a notice of appeal before the cross-claim and the third-party complaint had been disposed of. No order had been entered under Rule 54(b), Fed.R.Civ.P., making the jugment against Morris separably final. This court entered an order authorizing the trial court to entertain a motion giving the Morris judgment separable finality and

expressly retaining "jurisdiction of the cause for all other purposes". The trial court then dismissed the indemnity claims and Morris proceeded on appeal without filing another notice of appeal "in reliance upon the order of this court retaining jurisdiction". 442 F.2d at p. 1250.

In denying the motion of Uhl & Lopez to dismiss the appeal as premature we said,

> In our view, the notice of appeal had capacity in the circumstances to provide jurisdictional basis that would entitle this Court to refuse, as it did, to make dismissal of the appeal out-of-hand and to allow the notice to ripen into full effectiveness as to the rendered judgment, *since it seemed apparent that the judgment would remain unchanged in its form and content;* that its lack of technical formal finality would become dispelled in natural course and within a not undue period of time; and that no prejudice could result to any one from so dealing with the notice. [444 F.2d at p. 1250] (Emphasis supplied).

In *Uhl & Lopez* the appealed judgment was entered on the principal claim, a claim separable from the still unresolved claims among the interpleaded parties. All that remained for disposition were the indemnity claims and this was the situation when the notice of appeal was filed. The judgment appealed from lacked finality only because of the failure of the trial court to comply with the formalities of Rule 54(b) and this court expressed the belief that no disposition of the indemnity claims would alter the form and content of the judgment appealed from. In the case at bar, on the date that Montgomery filed his notice of appeal, his motion for judgment n.o.v. was pending—the disposition of which clearly could have changed the form and content of the judgment.

Rule 4(a), Fed.R.App.P., requires that in a civil case the notice of appeal must be filed within thirty days from

the date of the judgment or order appealed from. The rule specifically provides that the running of the time for filing a notice of appeal is terminated by the timely filing of a motion for judgment n.o.v. " . . . and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of [an order] granting or denying a motion for judgment under Rule 50 (b)." The requirement of Rule 4, Fed. R. App.P., is mandatory and jurisdictional. *Gooch v. Skelly Oil Co.,* 493 F.2d 366 (10th Cir. 1974), *cert. denied,* 419 U.S. 997. And see *United States v. Robinson,* 361 U.S. 220, 228.

The circuits are not in agreement as to whether the filing of a notice of appeal automatically divests a district court of jurisdiction and transfers jurisdiction to the court of appeals. See e.g., *First Nat'l Bank of Salem, Ohio v. Hirsch,* 535 F.2d 343 (6th Cir. 1976);*United States v. Lafko,* 520 F.2d 622 (3d Cir. 1975); and *Williams v. Bernhardt Bros. Tugboat Serv., Inc.,* 357 F.2d 882 (7th Cir. 1966). We have held that a district court retains jurisdiction if the notice of appeal is untimely filed or refers to a non-appealable order. *Arthur Andersen & Co. v. Finesilver,* 546 F.2d 338 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096. And see *Hodgson v. Mahoney,* 460 F.2d 326 (1st Cir. 1972), *cert. denied,* 409 U.S. 1039; *Ruby v. Secretary of United States Navy,* 365 F.2d 385 (9th Cir. 1966), *cert. denied,* 386 U.S. 1011.

Where the trial court has power to further review its judgment it cannot be said that the judgment is final as long as it is being considered by the court. *Suggs. v. Mutual Ben. Health & Acc. Ass'n.,* 115 F.2d 80 (10th Cir. 1940). An attempt to appeal a non-final decision of a district court remains just that, an attempt. It is a nullity and does not divest the trial court of its jurisdiction. *Euziere v. United States,* 266 F. 2d 88 (10th Cir. 1959), *vacated on other grounds,* 364 U.S. 282. In our view, when one of the mo-

tions enumerated in the second pargraph of Rule 4(a), Fed. R.App.P., is timely filed after the entry of judgment in a civil case the judgment does not become final until the motion has been ruled upon by the trial court. A notice of appeal filed while such a motion is still pending in the trial court is prematurely filed and does not transfer jurisdiction to the court of appeals.

In the case of *Barnett v. Life Ins. Co. of the Southwest,* 562 F.2d 15 (10th Cir. 1977), the defendant had filed a motion for judgment n.o.v. after judgment had been entered and after the plaintiff had filed its notice of appeal. The trial court granted judgment n.o.v. and on appeal the plaintiff urged that the trial court lacked jurisdiction to consider the motion for judgment n.o.v. We said,

> It is apparent from the record that the trial court had not concluded its consideration of the jury verdict at the time appellant's first notice of appeal was filed. The matter thus was not final, and the notice of appeal filed in an attempt to prevent further consideration of the verdict by the trial court was not effective.

The finalilty requirement of 28 U.S.C. § 1291 must have been satisified as of the date a notice of appeal is filed. *Biliske v. American Nat'l. Bank & Trust Co. of Shawnee,* Nos. 77-1379, 77-1380, and 77-1448 (10th Cir. Oct. 5, 1977). On June 10, when Montgomery filed his notice of appeal, his motion for judgment n.o.v. was pending. It was not ruled upon until June 16 when it was denied. A motion for judgment n.o.v. is not addressed to mere matters of form but raises questions of substance since it seeks alteration of rights already adjudicated. The filing of one of the motions enumerated in the second paragraph of Rule 4(a) does not merely result in mechanical enlargement of the time within which an appeal must be taken. The pendency

of any such motion vests in the trial judge continued control over the judgment and until disposed of the judgment does not become final for the purpose of appeal. *Leishman v. Associated Wholesale Elec. Co.,* 318 U.S. 203; *Green v. Reading Co.,* 180 F.2d 149 (3d Cir. 1950). *Barnett v. Life Ins. Co. of the Southwest, supra.*

We are disinclined to erode the finality doctrine by indirection. For,

> . . . allowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—"that of maintaining the appropriate relationship between the respective courts. . . This goal in the absence of most compelling reasons to the contrary, is very much worth preserving."

Coopers & Lybrand v. Livesay, 437 U.S. 463; *Parkinson v. April Indus., Inc.,* 520 F.2d 650 (2d Cir. 1975). And see *Siegal v. Merrick,* ..... F.2d ....., 47 L.W. 2418 (2d Cir. 1978). Our position, we think, is in accord with that of the Supreme Court in *Coopers & Lybrand v. Livesay* and as voiced in *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, the case in which the collateral order doctrine was forged. There the court said at page 546,

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal.

Although the premature notice of appeal did not transfer jurisdiction to this court, Montgomery did not lose his right to appeal. Within thirty days after entry of the order denying the motion for judgment n.o.v. he could have filed

a new notice of appeal effectively transferring jurisdiction to this court. The duty devolves upon litigants, especially appellants, to ascertain the state of the record and to make certain that it is in proper form for an appeal. *Green v. Reading, supra.*

Montgomery urges that we look beyond the technical requirements of Rule 4, Fed.R.App.P., and allow the appeal in order to prevent injustice in light of the fact that Century has neither claimed nor made a showing that it has in any way been prejudiced by the premature filing of the notice of appeal. Like all jurisdictional requirements the one Montgomery failed to meet is a technical one. However, it is based on important substantive policies regarding the finality of judgments and affects the very jurisdiction of this court.

Some circuits have ruled that when a Rule 4(a) motion is timely filed any judgment theretofore entered ceases to be final until the motion is ruled upon and until then any appeal from the judgment is premature and subject to dismissal. *Wiggs v. Courshon,* 485 F.2d 1281 (5th Cir. 1973); *Keith v. Newcourt, Inc.,* 530 F.2d 826 (8th Cir. 1976). In other circuits it has been held that a premature appeal taken from a judgment which is not final, but which is followed by an order that is final, may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party. See e.g., *Eason v. Dickson,* 390 F.2d 585 (9th Cir. 1968); *cert. denied,* 392 U.S. 914; *Richerson v. Jones,* 551 F.2d 918 (3d Cir. 1977). In the very recent case of *Yaretsky v. Foley,* .....F. 2d ..... (2d Cir. 1979), the court in its opinion said,

> . . . the better rule is that in the absence of prejudice to the appellee, the court should treat a premature appeal as from a final judgment so as to avoid denial of justice, expense, and inconvenience.

We cannot agree that this is the better rule. Litigants — appellees as well as appellants — have a right to rely upon conformity by their adversaries with applicable statutes and rules, especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself. Expense, inconvenience, and what a litigant may believe to be injustice, are unavoidable consequences of failure to abide by a statute or rule, e.g., a statute of limitation. There is some virtue in finality — in an end to litigation. When a notice of appeal is prematurely filed the case is not in limbo. The trial court retains jurisdiction and a timely appeal may be taken from the final judgment when entered.

The defendant suggests that his motion to stay the injunction, filed in the district court September 7, more than thirty days after denial of his motion for judgment n.o.v., should be treated as a sufficient and timely notice of appeal — sufficient because it contains reference to an appeal having been taken from the May 11th judgment, and timely because filed within thirty days from the date of entry of the order granting the injunction. The motion to stay was, by its own recitations, filed under the provisions of Rule 62(c), Fed.R.Civ.P., which has reference to an appeal from a final judgment granting or denying an injunction. Both Civil Rule 62(c) and Appellate Rule 8 presuppose the existence of a valid appeal. Obviously Montgomery when he prepared and filed his motion for an order staying the injunction, believed that he had effectively appealed from the judgment and did not then intend his motion to serve as a notice of appeal, and we do not so construe it.

For the reasons given we conclude that this court lacks jurisdiction. The appeal is dismissed for want of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

CENTURY LAMINATING, LTD., Plaintiff, *vs.* STEVEN H. MONTGOMERY, individually, and d/b/a LAMINATING COMPANY OF COLORADO, and d/b/a AMERICAN LAMINATING COMPANY, and AMERICAN LAMINATING COMPANY, a Colorado Corporation, Defendants.	No. 76-197-P Civil

JUDGMENT

THIS CAUSE coming on to be heard and the Plaintiff, Century Laminating, Ltd., appearing by its attorneys, Robinson, Stevens & Wainwright, and the Defendants, Steven H. Montgomery, and American Laminating Company, a Colorado corporation, appearing by their attorneys, Coors, Singer & Broullire, a jury of six persons was regularly empaneled to try said action, and witnesses on the part of the Plaintiff and Defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the Court, the jury retired to consider their verdict and subsequently returned into the Court, and rendered their unanimous verdict as follows:

That the Plaintiff should have and recover from both of the Defendants the sum of $14,000.00 in compensatory damages, and the sum of $14,000.00 in punitive damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said Plaintiff, Century Laminating Ltd., have and recover of and from the said Defendants Steven H. Montgomery and American Laminating Company a Colorado corporation, the sum of $14,000.00 in compensatory damages, and the sum of $14,000.00 in punitive damages, together with interest and costs, and let execution issue therefor.

UNITED STATES DISTRICT JUDGE

APPENDIX C

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4.

APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the mean-

ing of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

APPENDIX D

28 U.S.C. §1291. **Final decisions of district courts**
The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Island, except where a direct review may be had in the Supreme Court.